Filed 8/28/19 P. v. Mendoza CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ANGEL MENDOZA, Defendant and Appellant.	B287414 (Los Angeles County Super. Ct. No. GA101823)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Villalobos, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Robert Angel Mendoza (defendant) appeals from the judgment entered after his conviction of four felonies, including possession of methamphetamine for sale. He contends that the trial court erred in denying his motion to suppress evidence and in admitting evidence of text messages found on his cell phone. In supplemental briefing, defendant contends that the imposition of fines and fees at the time of sentencing violated his federal due process rights. Finding no merit to the claims, we affirm the judgment.

BACKGROUND

Defendant was convicted after jury trial of four felony counts as follows: possession of methamphetamine for sale in violation of Health & Safety Code section 11378 (count 1); possession of methamphetamine with a firearm in violation of Health and Safety Code section 11370.1, subdivision (a) (count 2); possession of a firearm by a felon, in violation of Penal Code section 29800, subdivision (a)(1)[1] (count 3); and unlawful possession of ammunition in violation of section 30305, subdivision (a)(1) (count 4). As to count 1, the information alleged, pursuant to Health and Safety Code section 11370.2, that defendant had suffered six prior controlled substance convictions; and as to counts 1, 2, and 4, it was alleged that the same six convictions were prior prison terms under section 667.5, subdivision (b).

Defendant waived his right to a jury trial on the prior convictions, and in a bifurcated proceeding, the trial court found the allegations true. On January 9, 2018, the trial court

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

sentenced defendant to nine years in prison, consisting of the high term of four years as to count 2, plus one year for each of five prison term enhancements. As to each of counts 1, 3, and 4, the trial court imposed the high term of three years, plus five prison-prior enhancements, and stayed execution pursuant to section 654. The court imposed a $300 restitution fine, a court fee of $40, a criminal conviction assessment of $30, and a crime lab fee of $50 with no penalty assessment, to be collected by the Department of Corrections. Defendant was awarded 505 days of presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

Prosecution trial evidence

Margaret Chinn, who lived on Bradshawe Avenue, a cul-de-sac in a residential neighborhood, was leaving for work on May 2, 2017, just before 8:00 a.m., when she saw a suspicious looking man she had never seen before. The man, whom she later identified as defendant, was standing next to a bicycle, looking at her next-door neighbor's house. As she drove past, he looked at the balcony and to the left and right of the house. Chinn then turned around and went back to see if he was still there. On her return she saw he had moved a bit toward the back of the house. She called 911 and gave a description of the man: appeared to be Hispanic, around 40 years old, wearing a black shirt and black pants, dark sunglasses, had a bicycle, and was holding a cigarette.

Monterey Park Police Officer William Leon testified that he was dispatched to Bradshawe Avenue to look for a male Hispanic in his 40's, wearing a black shirt or sweatshirt, black pants or shorts, next to a bicycle, smoking a cigarette, and wearing

sunglasses. Upon his arrival he saw defendant, who matched that description. No one else was in the area. Officer Leon parked, got out of his patrol car, and asked defendant what he was doing. Defendant replied, "I live across the street." At that moment a woman came out of the house that defendant had pointed toward. As she was getting into her car Officer Leon asked whether defendant lived there. After she replied "No," the officer asked defendant why he had lied. Defendant looked nervous and began visibly sweating. Officer Leon then asked defendant whether he had any weapons or narcotics on his person. Defendant replied that he had a Smith & Wesson in his backpack and methamphetamine in his sweatshirt pocket.

Knowing that Smith & Wesson was a gun manufacturer, Officer Leon handcuffed defendant, had him sit on the curb, and searched the backpack. He found a .38-caliber Smith & Wesson pistol with three bullets in the cylinder. He also found a black ski mask, gloves, three vehicle keys, night vision goggles, tools, credit cards, a gift card, cigarettes, a wallet with $764 in it, and several items of jewelry, including two watches, a necklace, and two bracelets. While searching the backpack, Officer Leon heard a cellphone ringing, and found several cell phones in the backpack. He then searched defendant's sweatshirt and found a white substance that appeared to be methamphetamine in three baggies. A quick chemical test was positive for the presence of methamphetamine. Defendant did not display any symptoms of being under the influence of methamphetamine.

Defendant was arrested and taken to the police station. The investigating officer, Detective Gonzalo Gabriel testified that when he interviewed defendant after his arrest, defendant confirmed his identifying information and provided the first three

digits of his phone number, but claimed that he could not remember the last four. Asked if he knew why he was arrested, defendant said it was because of what was found in his backpack. When Detective Gabriel read *Miranda*[2] rights to defendant, defendant said he understood, but he refused to sign a form to that effect. Defendant claimed to have found the gun a few weeks earlier in an alley; that it was not loaded when he found it; and he had the three bullets before he found the gun. Defendant explained that he had several cell phones because he found things on the street, but he used only one of them, a white LG smart phone (the LG phone). Detective Gabriel later obtained the records for that phone.

A chemical analysis confirmed that the white substance in the baggies was methamphetamine. The combined weight of the substance was 70.4097 grams. Detective Alice Porter testified as an expert in the area of narcotics sales. She testified that the minimum usable amount of methamphetamine for personal consumption was .2 grams; thus the seized methamphetamine amounted to about between 280 and 350 doses, and it was unlikely that a methamphetamine user would carry 70 grams of methamphetamine on his person. Not only would the user worry about being robbed, users more commonly purchase small amounts every few days. Detective Porter also testified that having over $700 in various denominations indicated sales, as it would provide the ability to make change during transactions. She also testified that having multiple items of jewelry suggested the practice of taking jewelry or other valuable items in lieu of cash in drug transactions.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Los Angeles County Deputy Sheriff Dan Morgan, a cell phone data extraction expert, prepared a report which included text messages sent to and from the LG phone. The report was admitted into evidence after all text messages unrelated to this case were redacted. Detective Porter reviewed the text messages and found many that indicated methamphetamine sales, using code words for the drug, amounts, and prices, such as "onion," "shirt," "ball," "saw," "zip," "knickknack" and "dime." For example, one text asked for an "eight ball" indicating an eighth of an ounce of methamphetamine. Another read, "I need a new shirt." Others asked about price, such as, "Think you can do a zip for 190?" And, "What can you do for 180?" Defendant replied, "I can give you a half," meaning half an ounce. Another text read, "Roberto can you spot me a dime just 'til my mother gives me money? It's me, J." Detective Porter explained that a dime is $10 worth of narcotics. "Spot me" meant to allow the buyer to pay later. Another buyer texted: "I'm going to need a sack. . . . I got 25 fuck it. Me get a teener. . . . 'Member I got 25." Detective Porter explained that "teener" was one-sixteenth of an ounce. Defendant replied to a text asking for "a ball for 40" with, "Let me see if I have that much left." Defendant then texted that he did not have a ball left, and that he had a "T for 25." The buyer replied, "I'll take it." Detective Porter testified that "T for 25" was most likely a teener for $25. She went on to explain other slang terms used in the text messages.

In response to a hypothetical question based on the facts in evidence, Detective Porter opined that the methamphetamine found on the hypothetical person was possessed for the purpose of sales. The most significant facts supporting her opinion were the amount of methamphetamine, the absence of symptoms of

personal use of the drug, the firearm, jewelry and cash, as well as the text messages containing such jargon as dime, knickknack, shirt, and teener.

DISCUSSION

I. Suppression motion

Defendant contends that the trial court erred in denying his pretrial section 1538.5 motion to suppress the evidence found in his backpack.

At the hearing on the motion the parties stipulated that there had been no warrant. Chinn and Officer Leon testified much as they did later at trial. Chinn testified that she left her Bradshawe Avenue home on a private cul-de-sac at about 7:47 a.m. on May 2, 2017. As she was driving to work, she saw a man she had never seen before, standing next to a bicycle, holding a cigarette, and looking at her next door neighbor's house. When she drove back to see if he was still there, he was closer to the house, so she called the police. She described him as Hispanic, about 40 years old, wearing all black clothing and dark glasses.

Officer Leon testified that shortly before 8:00 a.m., he had been dispatched to Bradshawe Avenue to look for a suspicious man described as a male Hispanic in his 40's, wearing a black shirt or sweatshirt, black pants or shorts, next to a bicycle, smoking a cigarette, and wearing sunglasses. He arrived within a minute or two of call, and saw defendant on the sidewalk about five houses away from the address he had been given. Defendant, who wore a backpack, matched Chinn's description. Officer Leon had not activated his patrol car's lights or siren. He parked, got out, did not draw his gun, did not physically restrain defendant, and there was no other officer on the scene. He approached defendant and asked what he was doing in the area.

Defendant pointed to a house across the street and replied, "I live across the street." At that moment, a woman came out of that house and Officer Leon loudly asked whether defendant lived there. As the woman got into her car to leave, she called back, "No, he does not," so the officer asked defendant why he had lied. Defendant did not respond. Officer Leon then asked defendant whether he had any weapons or narcotics in his possession. Defendant said, "I have a Smith & Wesson in my bag," and methamphetamine. Knowing that Smith & Wesson made guns, for safety reasons Officer Leon handcuffed defendant, had him sit on the curb and searched the backpack, where he found a .38-caliber Smith & Wesson pistol. He then found methamphetamine on defendant's person.

Defendant claims that the incident was an unlawful seizure of his person and that he was subjected to an unreasonably prolonged detention, making the subsequent search of the backpack unreasonable.

"'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

"The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .' . . . . [¶] The Fourth Amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, 'including

seizures that involve only a brief detention short of traditional arrest . . . .' . . . But '[o]bviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' [Citation.]" (*United States v. Mendenhall* (1980) 446 U.S. 544, 550-552 (*Mendenhall*); see also *Terry v. Ohio* (1968) 392 U.S. 1, 16-19, & fn. 16.)

Thus, "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' [Citation.]" (*Mendenhall*, *supra*, 446 U.S. at pp. 553-554.) "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [Citation.]" (*Id.* at p. 554, citing *Terry v. Ohio*, *supra*, 392 U.S. at p. 19, fn. 16.)

Defendant asserts that the principles articulated in *Mendenhall* are inapplicable because the facts of this case do not show a mere consensual encounter, as in that case. In *Mendenhall*, federal "agents wore no uniforms and displayed no weapons. They did not summon the [defendant] to their presence, but instead approached her and identified themselves

as federal agents. They requested, but did not demand to see the [defendant's] identification and ticket." (*Mendenhall*, *supra*, 446 U.S. at p. 555.) The Supreme Court concluded that "[s]uch conduct, without more, did not amount to an intrusion upon any constitutionally protected interest." (*Ibid*.) Defendant claims that the evidence presented here showed that *more than one* officer arrived in *multiple* patrol cars and "confronted" defendant on the street. He argues that being confronted by an armed and uniformed officer was more threatening and confrontational than the consensual encounter that occurred in *Mendenhall*.

Defendant's argument is based on facts found nowhere in the record. In fact, the uncontradicted evidence established that when Officer Leon arrived and during his contact with defendant, he was the sole officer on the scene. Moreover, Officer Leon had not activated his patrol car's lights or siren, did not display his weapon, make threats or issue commands, and he did not touch defendant. He merely approached defendant and asked what he was doing in the area. When defendant was caught in his lie about where he lived, Officer Leon merely asked him why he had lied. When defendant did not reply, Officer Leon asked him whether he had any weapons or narcotics. Defendant makes much of the fact that Officer Leon was in uniform and carried a holstered gun. The fact that an officer is in uniform or visibly armed "should have little weight in the analysis. Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the

weapon." (*United States v. Drayton* (2002) 536 U.S. 194, 204-205.)

A review of all the circumstances supports a finding that a reasonable person would have believed that he was free to leave. "'[T]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets' [citation]. Police officers enjoy 'the liberty (. . . possessed by every citizen) to address questions to other persons,' [citation], although 'ordinarily the person addressed has an equal right to ignore his interrogator and walk away.' [Citation.]" (*Mendenhall*, *supra*, 446 U.S. at p. 553; see also *Florida v. Royer* (1983) 460 U.S. 491, 497.) There was no seizure until Officer Leon handcuffed defendant and seated him on the curb. Thus, until then, there was no foundation for invoking the constitutional safeguards of the Fourth Amendment. (See *Mendenhall*, at p. 553.)

Defendant was not seized or detained by means of Officer Leon's question whether he had any weapons or narcotics on his person. "Asking questions, including incriminating questions, does not turn an encounter into a detention. [Citation.]" (*People v. Chamagua* (2019) 33 Cal.App.5th 925, 929.) In *Chamagua*, before seizing the defendant or his contraband, the officer asked the defendant whether he had anything illegal in his pockets; the appellate court held that once the defendant replied that he had a methamphetamine pipe, the officer had reasonable suspicion to detain and search him. (*Id*. at pp. 928-929.) Similarly here, defendant's statement that he had a Smith & Wesson in his backpack and methamphetamine in his sweatshirt pocket justified his detention and Officer Leon's search. (See also *Adams v. Williams* (1972) 407 U.S. 143, 146-148; *Terry v. Ohio*,

supra, 392 U.S. at pp. 22-24.) We conclude that the trial court did not err in denying defendant's motion to suppress evidence.

II. Admission of text messages

Defendant contends that the trial court erred in overruling his objection to the admission of the cell phone extraction report containing evidence of drug sales and proposed drug transactions.

Prior to the admission of the evidence, defense counsel noted that the report contained about 1,000 text messages predating the date of arrest on May 2, 2017. Counsel objected under Evidence Code section 352 on the ground that the evidence was cumulative. She asked that the trial court exclude all text messages that were sent or received prior to or after the date of defendant's arrest, which counsel estimated to be about 900. The prosecutor informed the court that all text messages unrelated to drug sales had been redacted from the report.[3] The trial court noted the redactions, and found the remaining messages relevant and more probative than prejudicial. The court impliedly found the texts not to be cumulative, observing that "[a] single transaction can take many, many texts."

Though defendant did not object to the evidence below as propensity evidence under Evidence Code section 1101, he raises that issue on appeal. A challenge "under Evidence Code section 1101 is not cognizable on appeal [where the defendant] failed to object on this basis at trial." (*People v. Valdez* (2012) 55 Cal.4th 82, 130; see Evid. Code, § 353.) Moreover, a limiting instruction would have attenuated any prejudice. (See *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754-755.) However, defendant did not request such an instruction, and the court was

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[3] By our count, approximately 60 text messages remained in the report.

not required to give one without request. (*People v. Collie* (1981) 30 Cal.3d 43, 63.) Defendant has thus forfeited this issue. Regardless, any error in admitting the evidence was harmless, as we explain within.

We agree with respondent that defendant has failed to demonstrate that the trial court abused discretion in weighing probative value against potential prejudice under Evidence Code section 352. The trial court enjoys broad discretion under that section in weighing the probative value of particular evidence against the potential for undue prejudice, and "its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) It is defendant's burden to demonstrate an abuse of discretion and a miscarriage of justice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.)

The probative value of prior drug sales to prove that the possessor of drugs harbored an intent to sell is well recognized. (See *People v. Ghebretensae*, *supra*, 222 Cal.App.4th at p. 754; *People v. Williams* (2009) 170 Cal.App.4th 587, 607; *People v. Ellers* (1980) 108 Cal.App.3d 943, 953; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691.) Defendant nevertheless argues that that the text messages had *no* probative value because there was no evidence that the drug jargon in the text messages referred specifically to methamphetamine, no evidence in the messages of any *completed* drug transactions, and no text messages indicating

he intended to sell methamphetamine in the particular neighborhood where he was arrested for the current offense.

We reject defendant's characterization of the evidence and his logic. First, although none of the text messages expressly used the term methamphetamine, the unrefuted testimony of the expert, Detective Porter, made clear that the text messages referred to that drug. Familiar with jargon used in drug sales, Detective Porter explained that although drug users commonly used code words to purchase drugs, rather than the name of the particular drug, some of the jargon used in the subject text messages was "pretty straightforward," such as an "eight ball," which signified an eighth of an ounce of methamphetamine. Second, the circumstantial evidence of completed drug transactions is found in the language of several texts to and from defendant. For example, some texts sent to defendant refer to needing a "shirt" and one of them indicates having "160." The response from defendant's phone was, "I can give you a half." In another, the text asks, "Can you throw in a shirt in too [*sic*] have 70." Defendant's reply text: "I'm by 7 Mares [a restaurant, according to Detective Porter] . . . I'm in the blue Titan." A reasonable inference to be drawn from such texts is that defendant was in possession of methamphetamine at the time he arranged the sales transactions by text, and then arranged to meet the buyer at a specific location in order to complete the sale. As for defendant's claim that the absence of text messages indicating that defendant specifically intended to sell methamphetamine at the time and in the neighborhood where he was arrested negates the value of evidence, we note that such explicit texts would have been probative of motive if defendant had been charged with attempting to sell methamphetamine at

the time of his arrest. However, the absence of such texts does not reduce their probative value of raising an inference of his intent to sell while he possessed 70 grams of methamphetamine.

We also reject defendant's argument that the potential for prejudice was severe and that the evidence was unduly inflammatory. "The prejudice that section 352 "'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.]'" "'[E]vidence [is] unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Scott* (2011) 52 Cal.4th 452, 490-491.)

Intent was a material issue in this case, as it is an element of the offense of possession of narcotics for sale. (See *People v. Ramos* (2016) 244 Cal.App.4th 99, 104-105.) Defendant himself demonstrates the highly probative nature and importance of the evidence, by arguing that without admission of the text messages, the jury might have believed that "[h]e could have just purchased the methamphetamine and intended on using it for his own personal use for the next year or so." Defendant's argument also demonstrates that the text messages, rather than being cumulative, were necessary to prove that 70 grams of methamphetamine suggests possession for sale, not use personal use. The evidence of prior drug sales was also not inflammatory when considering defendant's presence in a neighborhood where he did not live, carrying enough methamphetamine to divide into

approximately 300 doses, along with a concealed firearm, and his falsely telling a peace officer that he lived across the street. We discern no substantial likelihood that a jury would use the text messages for an improper purpose.

We find no abuse of discretion in the trial court's Evidence Code section 352 finding that the probative value of the text messages outweighed the potential for prejudice. In addition, defendant has failed to demonstrate a miscarriage of justice under the standard of *Watson*, which requires a showing of a reasonable probability that defendant would have obtained a different result absent the asserted error. The *Watson* standard also applies to erroneous admission of propensity evidence under Evidence Code section 1101; thus defendant would bear the same burden if he had preserved that issue for review. (See *People v. Thomas* (2011) 52 Cal.4th 336, 356.) Defendant merely asserts that without the text messages, "a jury may have found [he] possessed the methamphetamine for his own personal use." It might have, but we agree with respondent that it is not reasonably probable. Offer Leon, trained in the recognition of symptoms of methamphetamine use, saw no such symptoms in defendant. Defendant had enough methamphetamine in his possession for between 280 and 350 usable doses, much more than an ordinary user would be likely to possess, in the opinion of Detective Porter. Detective Porter also testified that carrying a concealed loaded firearm was not uncommon for a drug dealer, having over $700 in various denominations indicated drug dealing, as it was sufficient to make change, and that jewelry was commonly taken by drug dealers in exchange for narcotics. Given the evidence, we perceive no reasonable probability of a different result if the text messages had been excluded.

III. Ability to pay fines and fees

Defendant contends that the trial court violated his federal due process and equal protection rights and the Eighth Amendment by imposing the $30 court facilities fee pursuant to Government Code section 70373, the $40 court operations fee pursuant to Penal Code section 1465.8, subdivision (a)(1), as well as a $300 restitution fine pursuant to section 1202.4, without first finding that that he had the ability to pay them. He asks that we vacate the fees and fine, and remand the matter for a determination of his ability to pay it.

Defendant relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), in which Division Seven of this court held that constitutional considerations of due process and equal protection required reading into Government Code section 70373, Penal Code section 1465.8, and Penal Code section 1202.4, a procedure for obtaining a waiver of the assessments and fine on the ground of inability to pay.[4] (*Dueñas*, at pp. 1164-1169, 1172 & fn. 10.) In *Dueñas*, the defendant was indigent and homeless, suffered from cerebral palsy, and was the mother of young children; she

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[4] Government Code section 70373 and Penal Code section 1465.8 are silent as to whether defendant's ability to pay may or may not be considered. Section 1202.4, subdivision (d) provides in relevant part: "In setting the amount of the fine pursuant to subdivision (b) *in excess of the minimum fine* pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay . . . . Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1204.4, subd. (d), italics added; Stats. 2017, ch. 101, § 1.)

pled no contest to driving with a suspended license, was placed on probation, and ordered to pay $220 in fees and fines. (*Id*. at p. 1160.) The trial court further ordered that any amount left outstanding at the end of her probation would go to collections without further order of the court. (*Ibid*.) The evidence showed that Dueñas was not only unable to pay the current fines and fees, she remained liable for the court fees associated with prior misdemeanor convictions for driving without a license, which had gone to collection. (*Id*. at p. 1161.) The court held that the imposition of the fees and fines without considering the undisputed and considerable evidence of her inability to pay them punished her for being poor, in violation of due process guaranteed by the state and federal constitutions. (*Id*. at pp. 1160, 1164, 1172 & fn. 10.) As relevant here, the court also held that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Id*. at p. 1164.)

The *Dueñas* court relied on United States Supreme Court and California Supreme Court decisions which have held that constitutional equal protection and due process guarantees prohibit states from punishing indigent criminal defendants solely on the basis of their poverty, and thus states may not automatically revoke an indigent defendant's probation for failure to pay a fine or imprison an indigent defendant due to an inability to pay fines. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1166-1168; see, e.g., *Bearden v. Georgia* (1983) 461 U.S. 660, 667-

668 (*Bearden*); *Griffin v. Illinois* (1956) 351 U.S. 12, 17 (*Griffin*); *In re Antazo* (1970) 3 Cal.3d 100, 116-117 (*Antazo*).) Under the reasoning of those cases, the *Dueñas* court found the court's order -- that if Dueñas was unable "'to pay,' the fine and fees 'will go to collections *without any further order from this court*'" -- to be comparable to automatically revoking probation, and concluded that it was "'fundamentally unfair' to use the criminal justice system to impose punitive burdens on probationers who have 'made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of [their] own . . . .' [Citation.]" (*Dueñas*, *supra*, at pp. 1171-1172, quoting *Bearden*, at p. 668.)

The *Dueñas* court went further than the cited authorities, however, concluding that the trial court erred in refusing to consider the defendant's evidence of her present inability to pay the fines and assessments prior to imposing them. (*Dueñas, supra*, 30 Cal.App.5th at p. 1172 & fn. 10.) In *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), the same court clarified its holding in *Dueñas* by explaining that when a defendant presents evidence of an inability to pay fines, fees and assessments, "the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections. [Citation.]" (*Castellano*, at p. 490, citing *Dueñas*, at pp. 1168-1169.)

Respondent contends that defendant has forfeited the issue by not raising it in the trial court. It has long been the rule that failure to object to the imposition of fines and fees at sentencing forfeits the right to challenge them on appeal. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [probation costs and appointed

counsel fees]; *People v. Trujillo* (2015) 60 Cal.4th 850, 853-854 [probation fees]; *People v. McCullough* (2013) 56 Cal.4th 589, 596-597 [jail booking fee]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [restitution fine in excess of the minimum]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [same].)

Defendant contends that he has not forfeited the issue because it is solely a question of law. As the question of any individual defendant's ability to pay must necessarily turn on that defendant's particular financial circumstances, we reject defendant's assertion that he has raised only an issue of law. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153 (*Frandsen*).)

Defendant also posits that there is no forfeiture because *Dueñas* represented a significant departure from the law as it existed at the time of sentencing, which trial counsel could not have reasonably anticipated. Defendant points to *Castellano*, *supra*, 33 Cal.App.5th at pages 488-489, in which the court held that its opinion in *Dueñas* enunciated a new "constitutional principle that could not reasonably have been anticipated at the time of trial," thus excusing any failure to object to a minimum restitution fine. Agreeing with *Castellano* and finding no forfeiture are *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 (*Johnson*), and *People v. Jones* (2019) 36 Cal.App.5th 1028, both of which nevertheless found the asserted error harmless.[5]

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[5] Other courts addressing forfeiture involved a restitution fine in excess of the minimum, and thus subject to section 1202.4, subdivision (d), which provided for a claim of inability to pay even before the publication of *Dueñas*. (See, e.g., *Frandsen, supra*, 33 Cal.App.5th at pp. 1153-1154; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 463-464.)

We recognize the "rule that although challenges to procedures . . . normally are forfeited unless timely raised in the trial court, 'this is not so when the pertinent law later changed *so unforeseeably* that it is unreasonable to expect trial counsel to have anticipated the change.' [Citations.]" (*People v. Black* (2007) 41 Cal.4th 799, 810, italics added.) However, *Dueñas*'s new rule was not so unforeseeable. Long before *Dueñas*, the Eighth Amendment to the United States Constitution, the Due Process Clause of Fourteenth Amendment, and article I, section 17 of the California Constitution have prohibited the imposition of excessive fines and punitive awards. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727-728.) The *Dueñas* court acknowledged the recent trend toward protecting indigent persons from both criminal and civil penalties and fees they are unable to pay. (See *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168-1169, citing *People v. Neal* (2018) 29 Cal.App.5th 820 [probation fees], and *Jameson v. Desta* (2018) 5 Cal.5th 594 [court reporter fees].) The *Dueñas* court also acknowledged that existing law prohibited the punishment of criminal defendants solely on the basis of their poverty. (*Dueñas*, at pp. 1166-1167.) As observed in *Frandsen*, "[t]he *Dueñas* opinion applied 'the *Griffin-Antazo-Bearden* analysis,'" and "[t]he *Dueñas* opinion likewise observed '"[t]he principle that a punitive award must be considered in light of the defendant's financial condition is ancient." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 113.) The Magna Carta prohibited civil sanctions that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood. [Citation.]' [Citation.]" (*Frandsen*, *supra*, 33 Cal.App.5th at pp. 1154-1155, quoting *Dueñas*, at pp. 1168, 1170.)

We conclude that *Dueñas*'s departure from existing law was not so unforeseeable that it could not reasonably have been anticipated, and defendant has forfeited the issue. Regardless, we also find beyond a reasonable doubt that remand to determine defendant's ability to pay the modest fines and fees imposed in this case would not yield a different result. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Although the record contains no information about defendant's employment history, education, or finances, we can infer an ability to pay from probable future wages, including prison wages. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397, citing *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377; *People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377.) In California prisons, every able-bodied prisoner must work. (§ 2700.) At the time of sentencing, defendant was 43 years old, was able to walk around the front of a house, ride a bicycle, and sit on a curb. Prison wages range from a minimum of $12 per month to $56 per month depending on the prisoner's skill level. (See Cal. Code Regs., tit. 15, § 3041.2.) The Department of Corrections and Rehabilitation may garnish between 20 and 50 percent of those wages to pay a prisoner's restitution fine. (§ 2085.5, subd. (a); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.) The debt could be paid or significantly reduced by the time defendant is released from prison. Under such circumstances, there is no prejudice. (Cf. *People v. Johnson*, *supra*, 35 Cal.App.5th at pp. 139-140 ["The idea that he cannot afford to pay $370 while serving an eight-year prison sentence is unsustainable"].) We conclude beyond a reasonable doubt that remand would be futile, and we decline to order such an exercise in futility. (Cf. *People v. Bennett* (1981)

128 Cal.App.3d 354, 359-360 [remand for resentencing unnecessary where "the result is a foregone conclusion"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT